Supreme Court of the United States

OCTOBER TERM, 1944.

No. 455.

THE REPUBLIC OF MEXICO AND THE STEAMSHIP "BAJA CALIFORNIA" BY THE REPUBLIC OF MEXICO, ITS OWNER,

Appellants,

vs.

R. B. HOFFMAN,

Appellee.

APPELLANTS' OPENING BRIEF.

MORRIS LAVINE,
619 Bartlett Building, Los Angeles 14, California,
U. S. A. TRinity 3241,
Proctor for the Republic of Mexico and the Steamship "Baja California" by the Republic of Mexico, its owner.

RAOUL MAGAÑA,
215 West Seventh Street, Los Angeles 14,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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IN THE

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To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices Thereof:

Opinion Below.

The opinion below is reported in 143 Fed. (2d) 854.

Jurisdiction of This Court.

Jurisdiction is conferred upon this Court by Title 28, Section 347 United States Codes Annotated, Article III, Section 2, Clause 1, U. S. Constitution. The decision of the Circuit Court of Appeals for the Ninth Circuit dated June 30, 1944, was a final decision. "The Pesario," 225 U. S. 216.

The District Court of the United States, Southern District of California, Central Division, had assumed or acquired jurisdiction of the Steamship "Baja California,"

a vessel owned by the Republic of Mexico, where a fire occurred in Mexican waters in the harbor of Mazatlan, and as a result of maneuvers growing out of the fire which subsequently occurred, the appellee's ship was damaged and later sunk.

Short Statement of the Case.

The Republic of Mexico owns the Steamship "Baja California." They are the appellants herein. The Steamship "Baja California" is operated by the C.I.A. Mexicana de Navigacion del Pacifico S. de R. I. This company, a Mexican company, has a contract for the management and business operation of the "Baja California" for five years. [R. 48, 60.] The Mexican Government receives 50% of the distributable profits. [R. 61.] Title remains at all times in the Republic of Mexico. The ship is bound to and must carry on public service for the Government of Mexico or forfeit its contract to the Mexican Government, and the Mexican Government retains ownership at all times. [R. 58.]

During the month of October 1941, the "Lottie Carson," a vessel of 234 tons net, which was fitted for fishing for sharks, and which was owned by R. B. Hoffman, had gone to the harbor of Mazatlan, Mexico, for the purpose of fishing for sharks. During the morning of October 19th, the "Lottie Carson" was lying at anchor in the harbor. The Steamship "Campeche" which was also lying at anchor in the harbor of Mazatlan, farther out and in a southeasterly direction from the "Lottie Carson," caught fire at about eleven o'clock in the morning. The keeper of the port of Mazatlan, having taken control of the situation, ordered the "Baja California," a vessel of about 575 tons, to tow the "Campeche" into the harbor,

which it proceeded to do. During the course of the towing operations the "Campeche" went adrift, as a result of which the rudder of the "Campeche" struck the "Lottie Carson" on her port side, severely damaging the latter ship and cutting a hole in the planking of her side below the water line, resulting in the sinking of the "Lottie Carson." It was claimed that the "Baja California" was at fault, the libelant asserting that the "Baja California" let go the tow line which held the "Campeche." This was denied by the "Baja California."

All of these events took place within the port of Mazatlan, Mexico, within the three-mile limit of the shores of Mexico.

On December 14, 1941, R. B. Hoffman filed a libel, No. 1961 B. H. in the District Court of the United States for the Southern District of California, Central Division, against the Mexican Government-owned steamship "Baja California," which steamship was then in the friendly port of San Pedro, California, in Los Angeles Harbor. The libel was issued upon the steamer and it was arrested and taken into possession by the Marshal of the Court in the Harbor of Los Angeles. [R. 2-16, incl.]

On December 24, 1941, the Ambassador to the United States for the Republic of Mexico, Dr. Nejara, filed a suggestion by special appearance showing that the said steamship was at all times mentioned in the libel *owned* by the Republic of Mexico. [R. 19-21.]

On April 8, 1942, the Department of State transmitted to the court its statement that it accepted as true that the "vessel is the property of the Mexican State." [R. 147-162.] This was accompanied by a suggestion from the Ambassador of Mexico, not only that the vessel was the

property of the State, but that the occurrences took place in the port of Mazatlan, which would be close to the witnesses and the scene of the occurrences. Nevertheless, in the face of these statements and suggestions by the Mexican Government and declaration of the Department of State, the trial court assumed and asserted jurisdiction and proceeded against the Mexican Sovereign Government and the ship to judgment.

At the beginning of the proceedings in the District Court the Government of Mexico objected to the jurisdiction of the court and claimed its sovereign immunity for the "Baja California." This claim of sovereign immunity was denied by Judge Paul J. McCormick, who first passed upon the matter. Thereafter the case came on for trial before Judge Ben Harrison, who declined to consider the claim of sovereign immunity for the reason that it had been passed on and denied by Judge McCormick. The case then went to trial, the Government of Mexico at all times reserving its claim of sovereign immunity for the vessel which it owned.

On January 28, 1942, the United States Attorney for the Southern District of California, acting under the direction of the Attorney General of the United States, "as a matter of comity between the United States Government and the Government of Mexico for such consideration as this Court may deem necessary and proper" filed a Suggestion [R. 32] transmitting a Note of the Mexican Ambassador. The Note stated that the "Baja California" was owned by the Republic of Mexico. Libelant

filed a Statement of His Position in response to this Suggestion and, *inter alia*, expressly submitted that the suggestion did not constitute a recognition and allowance by the State Department of the claim of sovereign immunity. [R. 39.] An immediate hearing was then had on the issue of sovereign immunity. [R. 45.] This hearing was based on a stipulation as to the facts [R. 25] and on documentary evidence, consisting principally of the contract under which the "Baja California" was being operated by the Mexican corporation [R. 48], certain articles of Mexican law dealing with "general lines of communication" [R. 83] and various certificates attesting the authority of the Mexican Government and the Mexican Ambassador and the registration of the steamer. [R. 64-71.] This evidence shows, as we shall point out more particularly later, that the "Baja California" was owned by the Republic of Mexico.

On February 13, 1942, District Judge Paul J. McCormick made an order holding that under the rule of *The Navemar* (303 U. S. 68), no ground had been shown for ousting the jurisdiction of the District Court, respectfully declining the Suggestion of the Republic of Mexico and ordering that the "Baja California" remain in the custody of the United States Marshal until the further order of the Court." [R. 129.]

The Republic of Mexico on March 30, 1942, filed an answer to the libel [R. 132] and two claims, one in the usual admiralty form [R. 142], the second a special claim asserting sovereign immunity. [R. 143.]

On April 8, 1942, a second "Suggestion" was filed by the United States Attorney [R. 147] transmitting a Note from the Mexican Ambassador, stating in effect that if the vessel should be released, the Mexican Government would meet any liability that might be declared "Directly against it should the courts decide that execution may be had against the vessel." [R. 160.] This Suggestion, like the first, was presented as a matter of comity "for such consideration as the Court may deem necessary and proper." The State Department this time accepted as true the statement that the vessel is the property of the Mexican state. This (the ownership), as Mr. Welles stated, was conceded by libelant at the January hearing. [R. 149.] Libelant filed a reply to this Suggestion pointing out that if the vessel were released without a bond the District Court would have no jurisdiction to proceed further, and respectfully declining to accept the Mexican Government's proposal. [R. 165.] Libelant renewed his offer to accept a bond without prejudice to the claim of sovereign immunity, but the Republic of Mexico rejected this offer. [R. 177.]

The case then went to trial on the merits, before District Judge Ben Harrison, May 6, May 13 and May 14, 1942, the Government of Mexico reserving its claim of sovereign immunity at all times. Witnesses were called and examined by both sides and documentary evidence was introduced. During the trial counsel for the Republic of Mexico stated in answer to an inquiry from the Court, that the Mexican Government had no additional evidence to submit on the issue of sovereign immunity. [Stipulation, R. 225.] The Court declined to recognize the Mexican ownership of the vessel as granting sovereign immunity. It filed a memorandum opinion [R. 185] hold-

ing the "Baja California" solely at fault for the collision and the loss of the "Lottie Carson." The Court held that in the absence of any additional evidence or a showing of extraordinary circumstances calling for a review of the question of sovereign immunity, the ruling of Judge McCormick on that subject was the law of the case. [R. 189.]

Findings of fact and conclusions of law were filed July 31, 1942, and the same day an interlocutory decree and order of reference was made. [R. 201.] A reference was duly had to determine the amount of damage.

The District Court made a final decree on December 12, 1942 [R. 203], ordering a recovery in favor of libelant for the damages, interest and costs and directing a sale of the vessel to satisfy the decree. Before the sale took place, however, the Republic of Mexico filed a petition for and obtained an allowance of an appeal, and obtained the release of the vessel by making a cash deposit in lieu of a supersedeas bond. [R. 213.]

The Circuit Court of Appeals for the Ninth Circuit affirmed the District Court's decree, June 30, 1944. [R. 251.] A petition for rehearing was denied August 4, 1944. [R. 252.]

The Republic of Mexico then filed its petition for certiorari in this Court, which this Court granted.

During the course of the trial the State Department of the United States submitted a suggestion that the ownership of the vessel was in the Government of Mexico, and this was conceded by the appellee. The Government of Mexico also guaranteed to be bound by and to meet any liability which might be declared against the vessel which it owns. [R. 149.]

The trial court rendered judgment against the Republic of Mexico and the "Baja California" in the sum of $81,-700.05 damages, with interest, and costs in the sum of $4,625.29, as of December 12, 1942. [R. 208.]

An appeal was taken from the judgment of the District Court of the United States to the Ninth Circuit Court of Appeals, which affirmed the judgment on the basis of this Court's decision in the case of *The Navemar*, 303 U. S. 68, 82 L. Ed. 667.

The Government of Mexico has at all times reserved its claim of sovereign immunity and its right not to have it impleaded in a trial in the United States.

Issues Presented by This Appeal.

1. Where a friendly foreign government, to-wit, the Government of Mexico, owns a vessel and the title to the same, and allows one of its corporations to operate it for five years, are that nation and that vessel covered by the doctrine of sovereign immunity?

2. May a vessel owned by a foreign government, holding title to that vessel and exercising dominion over it be the subject of an action *in rem* in the District Court of the United States?

3. Does the District Court of the United States have jurisdiction of a foreign government and its property, to-wit, a ship, when it anchors in a port of the United States, to libel and seize that ship for an accident happening in its own territorial waters and its own port?

4. Where title and dominion to a ship are in a friendly foreign power ,and it is *in the public service of that country* but is operated by a corporation under what might be termed a "lend-leasing contract" for five years, is the

ship subject to libel in a court of the United States, even though absolute ownership is in the government of the friendly nation itself?

5. Must the District Court of the United States accept as true the finding of fact of the Secretary of State that the vessel is owned by a friendly foreign power, and on the basis of this finding alone dismiss the action for want of jurisdiction?

6. Did the District Court err in refusing to reconsider the question of sovereign immunity after the State Department recognized the ownership of the vessel as the Government of Mexico in an appropriate suggestion to the Court.

7. Does a friendly foreign government waive its sovereign immunity by answering in a court of the United States on the merits, during which at all times it preserves the challenge to the jurisdiction of the court for want of sovereign immunity?

Argument.

The Republic of Mexico owns the vessel "Baja California." This was conceded by the appellee, and it was established as a fact in the District Court of the United States. The Republic of Mexico appeared in court with the proper claim to ownership and title in the vessel. [R. 142, 143.]

Sumner Welles, Acting Secretary of the Department of State, informed the District Court:

> **"The Department accepts as true the statement that the vessel is the property of the Mexican State. This appears also to have been accepted by proctors for the libelant, as shown by paragraph (4) of the attached copy of a document which apparently was submitted to the court by them under the heading 'Analysis of the Note of the Honorable F. Castillo Najera.'"** [R. 149.]

The Republic of Mexico correctly stated its position and the law relative to the case, and the District Court erred in not accepting it. Its position was expressed as follows:

> "It is my Government's contention that, upon acceptance by the libelant of my Government's ownership of the vessel 'Baja California,' all *in rem* proceedings should have ended. Their continuation by the United States District Court was tantamount to placing my Government in the position of a party defendant in a legal action. In this respect, my Government contends that it is a rule of International Law—established beyond dispute—that the courts of a country are not empowered to implead a foreign sovereign." [R. 158.]

This is the doctrine of *The Siren*, 7 Wall. 74 U. S. 152, which holds that the sovereign cannot be sued without his consent. The same exception extends to his property, and a claim *in rem* cannot be forced against the sovereign whose property is immune from seizure.

In *"The Western Maid,"* 257 U. S. 419-433, it is held that the personality of a public vessel is merged in that of the sovereign. Therefore the immunity of a sovereign inheres in his public vessel.

In *Keokus v. United States*, 260 U. S. 125, it is held that sovereign property is exempt from seizure for a tort.

See also the following cases in support of the immunity of the sovereign:

Stanley v. Schwalby, 147 U. S. 508;
United States v. Clarke, 8 Pet. 436, 444;
Belnap v. Schild, 161 U. S. 10;
Kawananakoa v. Polyblank, 205 U. S. 349;
The Schooner Exchange, 7 Cranch, 11 U. S. 116;
The Ricardo, 99 Fed. (2d) 935;
Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 Fed. (2d) 705, 708.

A friendly foreign sovereign power is entitled to immunity from suits in the courts of another country, even in times not as extraordinary as the present. A friendly foreign power is entitled to plead its immunity from suit as a matter of right, and the court has in fact no jurisdiction to entertain an action against it. This principle is as applicable in the case of a merchant vessel owned by such sovereign power as it is to a war ship.

In *Berizzi Bros Co. v. s/s Pesaro*, 271 U. S. 562, this Court said, at page 574:

> "We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force."

In the *Pesaro* case the Court approved the doctrine which it had theretofore expressed, through Chief Justice Marshall, in *The Exchange*, 7 Cranch 116, that a foreign sovereign is entitled to immunity from suit in our courts as a matter of right. While in that case a public armed ship was involved, *The Pesaro*, *supra*, shows that the same principle applies to all ships owned by foreign sovereigns. In *The Exchange*, Chief Justice Marshall said, at page 147:

> "If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of the United States is at peace, and having entered an American port, open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country."

To the same effect is *The Parlement Belge*, 5 P. D. 197.

See also: *Ex Parte Muir*, 254 U. S. 522; *The Navemar* (2 C. C. A.) 102 Fed. (2d) 444; *Sullivan v. State of Sao Paulo* (2 C. C. A.) 122 Fed. (2d) 355. In the latter case, consideration was given to the question of the significance to be attributed to the actions of the State Department and the District Attorney in recognizing and allowing the claim of immunity of a constituent state of the United States of Brazil, and the Court held (p. 357):

> "Evidently some favorable implication must be drawn, for sometimes the Department has declined to act at all, as in Compania Espanola v. The Navemar, *supra*, and Molina v. Commission Reguladora, 91 N. J. L. 382, 103 A. 397, and has even positively expressed itself as opposed to a claim of immunity. The Pesaro, D. C. S. D. N. Y., 277 F. 473."

On the authority of *Miller v. Ferrocarril del Pacifico de Nicaragua*, 18 A. (2d) 688, the Court further held (in the *Sullivan* case) that the test of the attitude of the Executive Department through the State Department toward the validity of a claim of sovereign immunity or its recognition and allowance should be supplied by the Executive's representations and not by the technical nature of its appearance. The Court there said, page 357:

> "Here the Executive chose to transmit the claim, which act alone has been held to be an implied recognition.
>
> "And when pressed, it did much more. It not only vouched for the accuracy of the statements of fact made by the Brazilian Ambassador, but also declared it to be 'the view of the Department that the interest

of the Government of Brazil in the funds, as explained in the Brazilian Ambassador's note of July 11, 1940, is of such character as to entitle them to immunity from attachment by private litigants.' This appears to be a clear recognition of the claim of the Brazilian federal government so far as the Department is concerned . . ."

The Court continued, on the same page:

"We have no hesitation, therefore, in accepting these communications as the official representation of Executive acceptance of the Ambassador's claims. And therefore we accept for the purposes of decision herein the recitals of fact made by the Ambassador. Compare Banco de Espana v. Federal Reserve Bank, 2 Cir., 114 F. (2d) 438, 443. . . .

"Courts will undoubtedly accept as conclusive Executive pronouncements on whatever might be considered a 'political,' as opposed to a 'judicial,' question, *Doe ex dem.* Clark v. Braden, 16 How. 635, 57 U. S. 635, 14 L. Ed. 1090, including the question whether one is a sovereign, Oetjen v. Central Leather Co., 246 U. S. 297, 38 S. Ct. 309, 62 L. Ed. 726; Duff Development Co. v. Kelantan Government (1924) A. C. 797, and the question whether one is a sovereign's privileged diplomatic representative. United States v. Ortega, C. C. E. D. Pa., Fed. Cas. No. 15,971; Engelke v. Musmann (1928) A. C. 433; see *Ex parte* Baiz, 135 U. S. 403, 10 S. Ct. 854, 34 L. Ed. 222. Such questions as these must have been within the contemplation of the court in the Navemar case, when it said (303 U. S. page 74, 58 S. Ct. page 434, 82 L. Ed. 667): 'If the claim is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to re-

lease the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.' See Deak, *supra*, 40 Col. L. Rev. at page 462. For Executive action in respect to such questions, if not actually determinative of them, is at least the best evidence which it is possible to adduce. United States v. Liddle, C. C. E. D. Pa., Fed. Cas. No. 15,598."

Learned Hand, C. J. in a separate concurring opinion, said, at page 360:

"I can think of no rationale which will reconcile these doctrines except that the violation of a foreign state's possession is so grave an indignity as *ipso facto* to embarrass the relations between that state and the state of the forum; it is better that the wrongs of the court's nationals should be left to negotiation between the powers."

See also the following cases: *The Maliakos*, 41 Fed. Supp. 697; *Ex parte State of New York*, 256 U. S. 503, 65 L. Ed. 1063; *The Pesaro*, 271 U. S. 562, 70 L. Ed. 1088; *Sullivan v. State of Sao Paulo*, 36 Fed. Supp. 503, affirmed in 122 Fed. (2d) 355.

In the present case the District Court sought to deprive the friendly foreign sovereign, Mexico, of the right to maintain its dignity by granting sovereign immunity from the suit, and the second judge declined to review that decision.

This was error, since the State Department, by appropriate suggestion to the trial judge, recognized the ownership of the vessel as our friendly neighbor, the Government of Mexico.

In *Keokus v. United States*, 260 U. S. 125, it is held that sovereign property is exempt from seizure for a tort.

See also the following cases in support of the immunity of the sovereign:

Stanley v. Schwalzy, 147 U. S. 508;
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The Ricardo, 99 Fed. (2d) 935;
Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 Fed. (2d) 705, 708.

The Navemar, 303 U. S. 68, 82 L. Ed. 667, recognizes the doctrine of sovereign immunity as set forth and applicable to this case. However the District and Circuit Courts erred in its application of the principles of *The Navemar* case.

The courts below confused the ownership of a vessel with the operation and management thereof. Merely because a nation permits one of its corporations to operate its vessel does not change its right to the claim of sovereign immunity.

Questions closely akin to the present situation are contained in tax questions of property owned by the United States but operated by private corporations in various states in the development of war material. This court

has held such property exempt from *state taxation*. *U. S. v. County of Allegheny, Pennsylvania*, 82 L. Ed. 845.[1]

The Supreme Court said (88 L. Ed. 852):

"We think, however, that the Government's property interests are not taxable either to it or to its

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[1]Mesta Machine Company, an appellant with the United States, exists as a corporation under the laws of Pennsylvania and has a manufacturing plant in the County of Allegheny, of that Commonwealth, the County being appellee herein. It is engaged in the manufacture of heavy machinery. In October, 1940, the War Department desired to produce a quantity of large field guns. *It could have assembled an organization, created a government-owned corporation, and erected a plant which would have been wholly tax immune. Clallam County v. United States*, 263 U. S. 341, 68 L. Ed. 328, 44 S. Ct. 121. But for reasons of time and policy it chose to utilize a going concern under private management and ownership. Mesta's plant was not equipped for the manufacture of ordnance. It was agreed that certain additional equipment specially required for the work should be furnished at Government cost and should remain the property of the United States.

The contract provided that title to all such property should vest in the Government upon delivery at the site of work and inspection and acceptance.

By the second title of the contract the Government leased this equipment to Mesta for the period during which guns are manufactured by it under this contract or later supplements. As rental Mesta agreed to pay the sum of one dollar. Liability of Mesta for loss, damage, or destruction of equipment was "that of a bailee under a mutual benefit bailment." Mesta could not remove any of it without permission, and at all times it was accessible to Government inspection. On termination of the gun-supply contract, unless a stand-by contract was made, Mesta agreed to remove and ship the equipment according to Government direction, in good condition subject to fair wear and tear and depreciation.

The Court further said in *United States v. County of Allegheny*, 88 L. Ed. 852:

"We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands. The distinction between taxation of private interests and taxation of governmental interests, although sometimes difficult to define, is fundamental in application of the immunity doctrine as developed in this country."

> bailee. The 'Government' is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. . . . In United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 S. Ct. 478, this Court decided that improvements made upon lands to which the United States held title but which were put in possession of Indians for their benefit remained immune from taxation and that cattle, horses, and chattels purchased with the money of the Government and 'put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them' were likewise immune from taxation"

The Navamar Case, 303 U. S.

The facts in this case are easily discernible from the case of *The Navemar* and therefore present a cogent question for this court to decide. In *The Navemar* case the libellant was a corporation created under the laws of Spain but was domiciled, as far as domicile is possible to a corporation, in the United States with its affairs directed and controlled by its agents resident in the United States. The Steamship Navemar was under the Spanish flag, being registered in the port of Seville, Spain, which was not at any of the times material in that case under the jurisdiction or control of the Madrid government. For a number of years the Navemar had been owned and operated by the libellant, at no time during the period material to that litigation being in any Spanish port or within any Spanish territorial waters. She was engaged in the transportation of commercial cargoes between New York and South American ports pursuant to that charter.

While the Navemar was in Argentine waters on a voyage which she was making pursuant to her charter the Spanish consul at Rosario and at Buenos Aires, without the consent of the ship's owner or master, endorsed on two of the vessel's documents (not including the bill of sale or any document of title) a statement that the property in the vessel had passed to the Spanish government by a *decree* issued in Madrid on October 10th, 1935, by the President of Spain. This decree was *ex parte*. It was a decree of expropriation. There was no evidence in the record excepting the bare statement of the Spanish consul as to the effect of the Spanish decree even under the laws of Spain. [Record of Navemar Case, October Term 1937, No. 242.]

Contrast this with the case of the Baja California. The Baja California is owned by the Mexican government and title was and is at all times during matters pending herein in the government of Mexico. *(2) The government of Mexico at all times retained absolute ownership in the vessel. [R. 40, 50.] All liabilities in the case are against the sovereign government of Mexico. Mexico has even indemnified the government of the United States in connection with any possible judgment. (4) The vessel was at all times mentioned herein in the government service of Mexico. It was obligated to carry out routes determined by the navy of Mexico. [R. 51.] (8) It was obligated to transport the mail, the army, the navy, and political officers. [R. 52.] It had at all times mentioned herein the port facilities of the government of Mexico. [R. 54, 55.] The navigation service was at all times under the sovereign control of the Mexican government. [R.

58-60.] The ownership of the vessel remained at all times in the government of Mexico. [R. 69-72.] The object of the contract with public service [R. 58, 1], no exercise of private ownership over the ship or goods used in the service was violated. [R. 58, 59.] The government retained power to replace the management and business control of the ship which it permitted the management to operate only. [R. 60.] At any time that the vessel was not properly operated the government of Mexico retained the title and right to remove the management at all times.

The development in this country of the doctrine of immunity of foreign vessels stems from *The Exchange*, 7 Cranch. 116. The question there presented was whether a French war vessel was subject to the jurisdiction of our courts. It was held not to be upon the principle that a ship of a foreign friendly nation which constitutes a part of its military force, which is under the command of the sovereign and which is employed for obviously national purposes, should not be subject *in invitum* to interference by our courts. That was thought necessary if the sovereignty of a foreign friendly government was to be adequately and fully recognized. Where the vessel is one of war, all the elements of ownership, possession and direct operation by the foreign government are combined, and the national or public character of its functions is indisputable. But the notion of a public purpose has been extended and immunity granted though the vessel is commercially engaged. *Berrizi Bros. v. Pesaro*, 271

U. S. 562; *Carlo Poma*, 259 Fed. 369 (C. C. A. 2), rev'd on jurisdictional grounds, 255 U. S. 219; *The Maipo*, 252 Fed. 627 (D. N. Y.). In the *Pesaro* case the vessel was owned, possessed and operated by the Italian government in the carriage of merchandise for hire. The advancement of trade and the acquisition of revenue incident to participation in commercial services was deemed a sufficient public purpose. In England, the trend has been liberal (*The Jassy* (1906) P. 230; *The Porto Alexandre* (1920) P. 30) and the entire doctrine of immunity has been influenced by the theory that an action against the foreign vessel is not only *in rem* but also *in personam* against the foreign sovereign. *The Parlement Belge*, 5 P. D. 197. Inability to implead the foreign sovereign is singularly emphasized in *The Jupiter* (1924) P. 236.

One of the first principles recognized in the rudimentary body of international law since the Middle Ages to our day is that a vessel is considered, constructively at least, as part of the territory of the sovereign whose flag it flies and is subject, while on the high seas, or in foreign territorial waters, to the jurisdiction of that sovereign. *U. S. v. Rogers*, 150 U. S. 249; *The Scotland*, 105 U. S. 27; *Wilson v. McNamee*, 102 U. S. 574; *Crapo v. Kelly*, 83 U. S. 610; *E. B. Ward Jr.*, 17 Fed. 450 (C. C. La.)

The claim of the Mexican government of its ownership and public control of the Baja is borne out by the State Department and the concession of the libellant. The assertions of the State Department the courts are bound to

accept as conclusive in this case. (*Oetjen v. Central Leather Co.*, 246 U. S. 297.)

Having title to the vessel and having dedicated it to the public service of Mexico, the government of Mexico must be regarded as immune from the processes of the American court.

Oetjen v. Central Leather Co., 246 U. S. 297;
The Adriatic, 258 Fed. 902 (C. C. A. 3);
Berizzi Bros. Co. v. Pesaro, 271 U. S. 562;
Briggs v. Light Boats, 11 Allen (Mass.) 157;
Hyde, International Law, Vol. 1, Sec. 256;
The Roseric, 254 Fed. 154 (D. N. J.);
The Parlement Belge, 5 P. D. 197;
See, Note, 31 *Columbia Law Review*, 660, 662;
The Jupiter (1924) P. 236;
Contra, The Attualita, 238 Fed. 909 (C. C. A. 4);
Long v. Tampico, 16 F. 491 (D. N. Y.);
Carlo Poma, 259 Fed. 369 (C. C. A. 2), rev'd on jurisdictional grounds, 255 U. S. 219;
The Beaverton, 273 F. 539 (D. N. Y.);
Cf. The Johnson Lighterage No. 24, 231 Fed. 365 (D. N. J.);
The Davis, 10 Wall. 15.

Justice Clarke quoted the doctrine in the following words in the *Oetjen opinion*, 246 U. S. 297, at page 303, 38 S. Ct. 309, 62 L. Ed. 726:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

See, also:

U. S. v. Belmont, 85 Fed. Rep. (2d) 543.

The Circuit Court of Appeals for the Ninth Circuit took the view that there was no "pertinent distinction between the position of a government which has acquired title but not possession of a vessel and that of a government owning a vessel, of which by contract it has surrendered possession to a private corporation which is acting independently in a private enterprise."

However, the true facts of the Navemar make the distinction apparent.

The "Navemar" was merely attempted to be appropriated by edict of the Spanish government. It was not within the sovereign domain of the Republic of Spain, nor otherwise within its possession or *control*. It was in nowise in the public service of Spain, nor under any obligation to be. The occurrence that gave rise to the libel took place outside Spanish waters. The Spanish government had by edict attempted to seize the ship, then within the sovereign domain of the United States and thereupon to claim immunity from suit in the courts of the United States. [Record of the "Navemar," No. 242, October Term, 1937.]

But in the case at bar the title and ownership of the vessel was at all times in the government of Mexico. It was at the time of the occurrences giving rise to the libel action, in the territorial waters of Mexico (Mazatlan) and under the direction of the Portmaster of Mazatlan. The operating contract expressly reserved ownership at all times in the government of Mexico and was subject to cancellation at any time for nonperformance of its express terms and statutes among other things, requiring

the vessel to be in and perform the public service of Mexico. The term of the contract was five years with the governemnt sharing half the profits. The government of Mexico had at all times *ownership, dominion and control.* There was no attempt to appropriate it by an executive, *ex parte* decree, as in the case of the *"Navemar"* nor is there any question of title.

The "Baja California" must therefore be considered, constructively at least, as a part of the floating territory of the government of Mexico, whose flag she flew, whose property she was, and is, and whose ownership has been recognized as having at all times existed. As such it was immune from process of the courts of the United States.

But the District Court erred in holding that because it appeared in the American court to assert its sovereign immunity of its floating territory that it thereby waived its claim of immunity. The Republic of Mexico and the United States of America have a treaty of friendship and general relations by the terms of which, among each other, there is granted to the envoys, ambassadors, ministers, charges d'affaires and other diplomatic agents of each other, the same favors, privileges, immunities and exemptions which are granted or shall be granted to the agents of the most favored nation.

Under this treaty it was entitled to make appearance in our courts to assert its jurisdiction and the lack of jurisdiction of the court below, and upon the establishment of ownership of the vessel in its government it was entitled to have a dismissal of the action below.

Changing governmental structures require new definitions to be given to old words and interpretations of

sovereign immunity in the light of present day conditions.

The Republic of Mexico, our next door neighbor, and one of twenty-one nations of Latin America, in a friendly neighbor policy owns the vessel. This is conceded. It operates the vessel through one of its corporations—a creature of the State, and for a public purpose.

"Actual possession and custody of government property," says this court, "nearly always are in someone who is not himself the government, but acts in its behalf and for its purpose." *U. S. v. County of Allegheny*, 88 L. Ed. 853. As pointed out earlier in the case possession of government property is "always largely constructive."

But this does not relieve the doctrine of sovereign immunity. If this court should so hold, then the United States could not make claim for twenty-eight billion dollars worth of lend-lease material—owned by the United States but operated by others.

Another changed situation is State ownership of all property in some favored and friendly states. Our friendly ally, Russia, owns and possesses *all* property as a State. Under an identical situation, its ships would be state owned and operated. It could claim sovereign immunity while our friendly neighbor Mexico would be otherwise treated because of the operation of the ship by a corporation which can exist only in a democratic or free State. This interpretation of the law would put a penalty on democracy and on our friendly neighbors of Latin America, and not give them the same favors, privileges, immunities and exemptions which are granted or shall be granted to the agents of the most favored nation.

In 1 Benedict on Admiralty (Fifth Edition) 296, it is said:

> "As the foundation of jurisdiction *in rem* is the seizure of the property, jurisdiction is refused where such seizure by the courts of one sovereign is a dispossession of another sovereign and consequently contrary to the courtesy of kings, that comity of nations, that mutual deference and concession, by which amicable international relations are deemed best maintained. The public interest is thus preferred at some cost of inconvenience to individuals and of postponement of private rights."

It is respectfully submitted that the sovereign property of Mexico was immune from seizure and the court below was without jurisdiction to render the decree against this friendly neighbor.

Wherefore, the friendly foreign government, the Republic of Mexico, one of our allies in the struggle for freedom, and the owner of the Steamship "Baja California," prays that this Honorable Court reverse the judgment.

Respectfully submitted,

MORRIS LAVINE,

Proctor for the Republic of Mexico and the Steamship "Baja California" by the Republic of Mexico, its owner.

RAOUL MAGAÑA,

Of Counsel.